

January 12, 2001

By Hand and Facsimile

The Honorable John D. Ashcroft
Bush-Cheney Transition Office
1800 G Street, N.W.
Washington, D.C. 20270

Dear Senator Ashcroft:

On December 22, when you were nominated for U.S. Attorney General, you called me to ask if we could meet imminently and requested that I maintain an open mind on your nomination until such meeting took place. While I had, and continue to have, strong reservations regarding your nomination, I agreed to your request. After that call from you, I heard nothing from you for nearly two weeks. Subsequently, a meeting was scheduled but just as quickly canceled without explanation. Since then, I have again heard nothing from you. As the senior African American member in the United States Congress and the Ranking Democrat on the House Judiciary Committee, I find this somewhat disconcerting, particularly given that the idea for the meeting was initiated by you.

While I continue to have grave concerns regarding your nomination, I have nevertheless been willing to hear what you have say. However, you should know, as I am sure that you do, that your nomination has stirred profound controversy in this country, especially in the African American community. There is passionate concern that your positions and your statements over the years are both divisive and extreme. While I respect your right to cling steadfastly to your principles and beliefs, I question whether such principles and beliefs are appropriate for the nation's leading law enforcement official.

In this letter to you, I would first like to express to you the nature of my concerns regarding your nomination, and second to ask whether you would be willing to indicate specific steps, which if taken, may ameliorate some of these concerns. Because your statements and positions are regarded by many as being outside the mainstream, such action on your part may be critical to helping to quell the significant unease within the minority and civil rights communities regarding your selection and may even help win support for your nomination.

My reservations regarding your nomination stem both from statements you have made and positions you have taken, as well as the ideologically-driven manner in which you have responded to President Clinton's judicial nominations. I reference these concerns with footnotes only because, given the nature of the concerns, I believe it is very important that I be as specific and thorough as possible.

1. Public Statements

First, with regard to your public record, my principal concerns are that at a time when our nation needs bipartisan cooperation and healing, the statements you have made and the forums you have granted are highly divisive. I begin with the unfortunate fact that in 1999, you delivered the commencement address at, and received an honorary degree from, Bob Jones University. As you are no doubt aware, at that time the University banned interracial dating and continued to condemn the Catholic religion. While I respect your right to free speech, I hope you are not surprised that so many of us question the appropriateness of a nominee for Attorney General voluntarily seeking out such a controversial forum.

Furthermore, in 1998 you were quoted by *Human Events* as declaring that, A[t]here are voices in the Republican Party today who preach pragmatism, who champion conciliation, who counsel compromise. I stand here today to reject those deceptions. If ever there was a time to unfurl the banner of unabashed conservatism, it is now.¹ Again, I hope you can understand how comments such as these raise Ared flags@regarding your ability to reach out to Democrats and achieve a bipartisan consensus, as the President-elect has repeatedly pledged to do.

¹ John D. Ashcroft, HUMAN EVENTS (April 10, 1998).

I was also dismayed to learn that in the same year, you applauded the efforts of *Southern Partisan* ² which has a 20-year history of publishing what *The New Republic* has called, "a gumbo of racist apologies" ² stating: "Your magazine also helps set the record straight. You've got a heritage of doing that, of defending Southern Patriots like [Robert E.] Lee, [Stonewall] Jackson and [Jefferson] Davis. Traditionalists must do more. I've got to do more. We've all got to stand up and speak in this respect, or else we'll be taught that these people were giving their lives, subscribing their sacred fortunes and their honor to some perverted agenda." ³ By granting such an interview, and implying that slavery was something other than a "perverted agenda," you may have unwittingly fed the fires of intolerance hardly an auspicious beginning for an individual hoping to be charged with enforcement of the civil rights laws. This is particularly so as *Southern Partisan* has reportedly published articles arguing that slavery was beneficial for black families. Rather than setting the record straight, *Southern Partisan* has a history of doing just the opposite.

2. Opposition to President Clinton's Nominations due to mainstream positions they took

Second, the manner in which you have chosen to respond to previous judicial nominations by President Clinton has been, in my judgment, ideologically extreme and contrary to the best interests of justice. Most troubling is the manner in which you thwarted Judge Ronnie White's nomination to become a federal district court judge, the first African American Justice to ever serve on the Missouri Supreme Court. In a crusade the editorial page of *The New York Times* described as "mean-spirited and dishonest," ⁴ Whether your motivation for this assault was to burnish your anti-crime image in anticipation of your race for reelection by deceptively using Ronnie White as a symbol of tolerance for crime (which, if true, would be reminiscent of the odious Willie Horton ads of the 1988 campaign), or a desire to "get even" with Judge White due to his opposition as a state legislator to an anti-abortion bill you previously supported, ⁵ your

² Press Release of Institute for Public Advocacy, "Researcher Cites Ashcroft's Ties to White Supremacists" (January 2, 2001). For example, in 1996, *Southern Partisan* wrote that slave owners "encouraged strong slave families to further the slaves' peace and happiness." And in 1990, the magazine praised former KKK leader David Duke, calling him "a Populist spokesperson for a recapturing of the American ideal."

³ *Id.*

⁴ Editorial, "Mr. Bush's Rightward Lurch," *THE NEW YORK TIMES*, December 23, 2000, at A18, col. 1.

⁵ Erich Lichtblau, "Race an Issue for Ashcroft's Foes," *LOS ANGELES TIMES*, January 1, 2001, at A1.

willingness to attack a judicial nominee by grossly distorting his record does not inspire confidence that you are the right person to advise the President on judicial and other legal appointments. I reach this conclusion after having considered the following:

B In introducing Judge White to the Committee, former Missouri Representative Bill Clay noted that you said that you had canvassed the other six members of the state high court, all of whom spoke highly of the nominee and said he would make an excellent federal judge. You did not take issue with Representative Clay's statement. Nevertheless, you proceeded to lead the charge to sabotage his nomination, making White the first nominee in 12 years to fail on the floor of the Senate.

B Claiming that Judge White had voted against the death penalty more than any of his colleagues on the court, when in fact he voted to uphold the death penalty in 41 out of 59 cases **B** *more* than some of your own appointees to that court.⁶

B Singling out Judge White's sole dissent from the imposition of the death penalty in *State v. Johnson*⁷ as constituting a repudiation of the death penalty, when the case actually involved whether the insanity defense was properly argued, and not remotely the merits of capital punishment.

⁶ David Johnston, The 43rd President: The Choice **B** Man in the News; A Stalwart of the Right **B** John David Ashcroft, @THE NEW YORK TIMES, December 23, 2000, at A1, col. 5. In 10 out of the 18 cases in which Judge White voted to reverse the death penalty, the court was unanimous.

⁷ 968 S.W.2d 123 (Mo. 1998).

- B** Choosing not to directly confront Judge White on his judicial record by failing to ask him a single question at his confirmation hearing about his opinions in death penalty appeals.
- B** Publicly justifying your position on the White nomination in part based on the opposition of Missouri law enforcement groups, when in fact, it appears that you and your staff singlehandedly and with varying degrees of success attempted to persuade law enforcement officials in the state to oppose Judge White.⁸
- B** Repeatedly labeling Judge White Aprocriminal,@ which is an inflammatory, patently untrue, and deeply offensive charge to level at a distinguished sitting judge.

⁸ Michael Grunwald, AAshcroft's 99 Tactics in Spotlight,@ WASHINGTON POST, January 1, 2001, at A1. Notwithstanding Ashcroft's efforts, the Missouri chapter of the Fraternal Order of Police endorsed Judge White's nomination.

Beyond the Judge White controversy, I am concerned that you have engaged in a pattern of judicial bashing and mischaracterization in order to further an extreme right-wing agenda of opposition to Clinton judicial nominees. To cite one additional example, you opposed Judge Margaret Morrow **B** one of Los Angeles's preeminent business lawyers and a former President of the California Bar **B** based on her supposed liberal ideology. In particular, you objected to a law review article in which Morrow wrote that, **A**[t]he law is, almost by definition, on the cutting edge of social thought.⁹ You apparently took these words to evidence a belief on her part **A**that law can and should be used by those who interpret it to change social norms. . . .[@] Such a view was, in your words, **A**anti-democratic.^{@10} However, any fair reading of her article would reveal that this is an unfair caricature of her views, which is why Morrow was confirmed with the support of conservatives such as Judiciary Chairman Orrin Hatch. If then you **A**laid down the gauntlet[@] against a judicial nominee for expressing what appears to be mainstream legal views, why shouldn't the Senate use your own standard to vote against your confirmation given what appears to be your clear history of articulating views that appear to be extreme and well outside the mainstream of legal thought in America?

You have also inveighed against a host of other nominees on the grounds that they were **A**judicial activists,[@] and spoken out repeatedly against **A**renegade judges,[@] describing them as a **A**robbed contemptuous elite.^{@11} I have spent a good part of my congressional career seeking to

⁹ **A**Comments From Senator Ashcroft on the Proper Role of Judges,[@]THE NEW YORK TIMES, December 24, 2000, at sec. 1, page 16, col. 1.

¹⁰ *Id.*

¹¹ *Id.* Judge White and Morrow are but two in a long line of distinguished judicial nominees **B** many of them minorities and women **B** who you opposed, even though they were confirmed on the floor of the Senate by wide margins. They include Judges Richard Paez, Marsha Berzon, and Margaret McKeown, all of whom were eventually confirmed to the Ninth Circuit

educate my colleagues and the American people about the critical role our independent judiciary plays in protecting our rights and liberties. Unfortunately, comments such as these seem wholly divorced from the sober thought that one might expect from an Attorney General, express a desire to politicize the independent judiciary, and again establish a standard of Senate confirmation of nominees that disfavors you.

3. Policy positions that are outside the mainstream

Third, with regard to the policy and legislative positions you have advocated, my concern is that not only do these positions place you well outside of the mainstream of American life, but they seriously call into question your ability to fairly and faithfully enforce existing laws, particularly with respect to civil rights, reproductive choice, and gun safety.

To begin with, in terms of civil rights, your long record of hostility raises concerns among many of us that the Afox@ will be guarding the Ahenhouse@ in this critical area of the Justice Department's responsibility. Indeed, your record on minority rights and opposition to affirmative action has led the NAACP to give you a failing grade B an AF@B for each of the last three Congresses. Thus, in 1998, you were one of a small minority of Senators who voted to abolish the Disadvantaged Business Enterprise Program, the bipartisan federal set-aside program to enable minorities and women to compete for transportation grants. I was also extremely disappointed in your actions as Chairman of the Constitution Subcommittee in killing the Senate version of my racial profiling bill. Although at the hearing you promised that you could support the bill with a few minor changes, when Senator Feingold sought to address these concerns, you apparently continued to stymie its progress.¹² Of additional concern to me is the fact that you were one of a minority of Senators who voted against the Hate Crimes Prevention Act, which would have merely provided a penalty enhancement for violent crimes based on race, religion, ethnicity, gender, sexual orientation or disability; and you voted against the Employment Non-Discrimination Act, which would have prohibited job discrimination based on sexual orientation.

Also, at a time when nearly all Americans would support non-mandatory efforts to end segregation, I was shocked to learn that when you were Missouri's Attorney General, you opposed a *voluntary* school desegregation plan in St. Louis.¹³

One has to question not only the wisdom and open-mindedness these positions reflect, but whether they will allow you to impartially enforce existing civil rights laws. I need not remind you that the laws of the land continue to provide for affirmative action, and they continue to forbid police actions motivated by race. One has to question whether an individual who has forcefully challenged such modest legal extensions with regard to discrimination can bring the full and needed vigor and resources to enforce the existing laws in the afore-described areas.

¹² AQuestions about race may take center stage in hearing,@ST. LOUIS POST-DISPATCH, January 3, 2001, at A1.

¹³ Editorial, AMr. Bush's Rightward Lurch,@THE NEW YORK TIMES, December 23, 2000, at A18, col. 1.

In your recent bid for the United States Senate, it appears that you had virtually no support in the African American community in Missouri, which has watched you up close for nearly twenty years as both governor and senator of that state. Given that fact, what kind of message then, do you and President-elect Bush send to the African American community nationwide with your nomination?

Similarly, with regard to reproductive freedom, your extreme policy record must call into question your interest in enforcing existing law concerning a woman's right to choose. I say this because of your very public and unyielding efforts to overturn the Supreme Court's seminal decision in *Roe v. Wade*, protecting a woman's right to choose and the primacy of her own interest in her life and health. It is no secret that you were a lead sponsor of the "Human Life Amendment," and a corresponding federal statute (the "Human Life Act") that would have banned abortion, even in cases of rape, incest, or when there is a threat to the health of the mother,¹⁴ and that in 42 out of the 43 votes concerning reproductive rights, you cast a vote aimed at overturning *Roe v. Wade*. Consistent with this voting record, you stated in a 1998, appearance on NBC's "Meet the Press," that outlawing abortion was a higher priority for you than cutting taxes. And in a statement submitted to *Human Events: The National Conservative Weekly*, you wrote: "[I]f I had the opportunity to pass but a single law, I would fully recognize the constitutional right to life of every unborn child, and ban every abortion except for those medically necessary to save the life of the mother."¹⁵

There is also significant troubling precedent for your having used previous positions in State government to further your radical views on reproductive choice. For example, as the state attorney general, you personally argued unsuccessfully in the United States Supreme Court in defense of a state requirement that would have required all abortions during the first twelve weeks of pregnancy to be performed in a hospital. A clear end-run around *Roe*.¹⁶ You defended a blatantly unconstitutional state regulation that would have barred the state from using any funds

¹⁴ The language of your "Human Life Amendment" and "Human Life Act" not only imposed a near-absolute ban on abortion, it also defined "human life" as beginning at "fertilization." This would have led to a ban on some of the most widely accepted and dependable forms of contraception, such as the pill and IUDs, which sometimes work by preventing a fertilized egg from implanting in the lining of the uterus. Indeed, it appears that you believe that common forms of contraception that act to prevent implantation should be considered "abortifacients."

¹⁵ John D. Ashcroft, *HUMAN EVENTS*, at 7 (May 29, 1998).

¹⁶ *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

to assist poor women obtain safe, legal abortions even in cases of rape or incest.¹⁷ And as governor, you helped to develop the legislation again aimed at overturning *Roe*, which was later found unconstitutional under *Webster v. Reproductive Health Services*. This does not bode well for those who expect the Attorney General to impartially enforce the laws and take appropriate legal positions. Thus, when you joined with a small minority of Senators in opposing a common sense provision to prevent abortion clinic bombers from using the bankruptcy laws to avoid paying damages to their victims, many of us are obviously led to question the vigor you would bring to enforcing the Freedom of Access to Clinic Entrances Act as Attorney General.

Finally, your unyielding record in opposition to gun safety laws and close ties with the National Rifle Association also appears to be out of step with the electorate which is clearly concerned with the epidemic of gun violence our communities face each and every day. For example, your record on gun safety has earned you a spot on a list of the 10 biggest obstacles to gun reform in Congress; the Violence Policy Center has taken the unprecedented step of opposing your nomination, the first time in its history that it has ever opposed a federal cabinet nominee; and Handgun Control reports that you opposed every single bill on its priority list during your six years in the Senate. In 1999, you were one of only 20 Senators to vote against an amendment to prohibit the sale or transfer of handguns without safety locks. You also voted against the Lautenberg-Kerrey bill that would have closed the gun show loophole, and during your Senate campaign, you declared your opposition to the assault weapons ban.

¹⁷ *Reproductive Health Services v. Freeman*, 614 F.2d 585 (8th Cir. 1980).

Your close association with the NRA has been demonstrated by the fact that as a sitting U.S. Senator, you took the unusual step of preparing radio ads for them as part of their unsuccessful campaign on behalf of a concealed weapons initiative in Missouri.¹⁸ Not surprisingly, the NRA spent liberally in support of your reelection, apparently funneling \$339,237 in independent expenditures into efforts on your behalf.¹⁹ If this past record forms the basis for the gun safety agenda you will bring to the Justice Department as Attorney General, then I fear many of the bipartisan law enforcement responsibilities and initiatives in the Department **B** such as the Brady Law and the Assault Weapons ban **B** may be undermined.

If one applies the same standard that you employed to justify your opposition to so many Clinton administration appointments **B** namely, your disagreement with their policies alone **B** then a majority of Americans, not to mention a majority of the Senate, might be compelled to oppose your confirmation. However, while I do not expect you to undergo a confirmation conversion at your hearing, I do expect you to pledge that you will vigorously enforce existing laws and maintain the activities of the Justice Department, even where you disagree with them.

In addition, I ask you to use your response to my letter as an opportunity not just to respond to these and other charges of political extremism on your part, but to indicate whether you would agree to make the following modest commitments to allay the growing concern regarding your nomination:

1. Defend targeted affirmative action programs endorsed by the Supreme Court in *Adarand v. Pena*.
2. Maintain the Department's decision to abstain from challenging the University of Michigan's affirmative action program the constitutionality of which was upheld recently by a federal court in Michigan.

¹⁸ Jake Tapper, "The NRA's big guns," @
<http://www.salon.com/news/feature/1999/08/12/nra> (August 12, 1999).

¹⁹ PAC Contributions to John Ashcroft, Center for Responsive Politics,
<http://www.opensecrets.org/candidates/pac/S4MO000037.html>.

3. Continue the Department's study of racial profiling, including the collection of data regarding traffic stops by state and local law enforcement officials.
4. Sustain or increase the level of enforcement activity investigating police brutality cases and systemic discrimination in police departments under 42 U.S.C. ' 14141.
5. Support the federal hate crimes legislation that already passed the Senate during the last Congress with the active support of your predecessor.
6. Sustain or increase the level of enforcement activity under the Freedom of Access to Clinic Entrances Act (FACE).
7. Refrain from using the Department to undermine or reverse the Supreme Court's decisions in *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Stenberg v. Carhart*.
8. Adequately fund and improve the effectiveness of the Brady Law's background check system and defend the system from efforts to reduce its funding or to in any way open the system to fraud and abuse.
9. Support the reauthorization of the assault weapons ban.
10. Maintain the Department of Justice's longstanding position regarding the scope of the Second Amendment and the corresponding position taken by the Department in *United States v. Emerson*.
11. Maintain and continue the full and vigorous investigation into the allegations of massive voter disenfranchisement and Voting Rights Act violations in Florida stemming from the 2000 presidential election.
12. Let stand the Attorney General's ruling that the DEA may not interfere with physician-assisted suicides as control of the medical profession is traditionally left to the states.
13. Devote sufficient resources to the vigorous enforcement of the antitrust laws, including support of the Antitrust Division's efforts in the *Microsoft* case.
14. Denounce the writings of *Southern Partisan* magazine that appear to justify past slavery of African Americans.

15. Announce a systematic program to attack racial supremacist and other hate organizations.
16. Lastly, demonstrate your commitment to diversity and excellence on the federal judiciary by supporting the appointment of Katherine McCree Lewis and Judge Helene White, who are from Michigan, to the United States Court of Appeals for the Sixth Circuit. Both nominations languished in Committee during the last Congress without a hearing or a vote. Judge White's nomination has been held up for over three-and-a-half years, while Lewis first was nominated over a year ago. President Clinton has resubmitted the nominations of both of these excellent candidates, along with the names of six other superb nominees to the federal courts of appeals. All of them are in judicial circuits where there are judicial emergencies, and deserve your support.

By these requests, I am not asking you to act as I would were I the Attorney General. On the contrary, these requests seek nothing more than a commitment from you that you will maintain certain vital Justice Department programs, activities, and initiatives which generally have bipartisan support. By agreeing to make these commitments, you would be meeting me **B** and the many millions of Americans who are concerned about your nomination **B** halfway. I look forward to hearing from you at the earliest opportunity.

Sincerely,

John Conyers, Jr.
Ranking Member